*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

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+ WRIT PETITION NO.18572 of 1994

% Dated 05.01.2007

S.Suresh, S/o.Sadagopan, 40 years, Business, Residing at H.No.6-3-855/1, Sadat Manzil, Begumpet, Hyderabad-16.

.

…. Petitioner

Vs.

$ M/s.Indian Oil Corporation Limited, rep.by General Manager (Marketing Operations), Southern Region, Indian Oil Bhavan, 139, Nungambakkam High Road, Madras-600 034 and another.

…. Respondents

! Counsel for the Petitioner: Sri V. Ravinder Rao

^ Counsel for the Respondent: Sri R. Raghunandan.

<GIST:

> HEAD NOTE:

? Cases referred

[1] (2005)8 SCC 242
2 (1991)1 SCC 533)
3 (2003)2 SCC 107
4 (2000)7 SCC 764
5 2004(3) ALD 463
6 2004(2) SCC 150
7 AIR 1990 AP 171
8 (2004) 14 ILD 395 (SC)
9 (2002) 5 ALD 389
10 AIR 1952 SC 16
11 AIR 1978 SC 851

THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

WRIT PETITION NO.18572 of 1994

ORDER:

Seeking a declaration that the order of the first respondent in proceedings No.R.SCD.132 dated 21.09.1994, terminating the Retail Outlet agreement with the petitioner, is illegal and arbitrary and for a consequential direction to have the order set aside, the present Writ Petition is filed.

The petitioner was appointed as a dealer of the first respondent-Corporation, for running a Retail Outlet for High Speed Diesel (HSD), under the name and style of Sree Rama Service Station at Autonagar, Ranga Reddy District. This Retail Outlet was established pursuant to the permission granted by the respondent Corporation in its letter dated 16.03.1979.

The impugned order dated 21.09.1994 refers to the inspection of the retail outlet on 28.12.1991. The Inspection report dated 28.12.1991, in turn, refers to the earlier inspection reports dated 28.09.1991 and 24.08.1991. In the Inspection report dated 24.08.1991 it is stated that the stock particulars were within permissible limits, the density test and the fuel was O.K, that the H.S.D. Pump was showing slow delivery, that the hosepipe needed to be replaced, that the tube lights of the pump were not

functioning, that the retail outlet was mismanaged, the dealer was absent and disinterested in business and that he should report to the Divisional office for discussion. Petitioner would contend that it is for the Corporation to change the pump and the hosepipe whenever necessary and to maintain proper illumination at the Retail Outlet, and it is not his responsibility to do so. According to the petitioner the observations in the report, that the Retail Outlet was mismanaged, that the dealer was absconding and was disinterested in the business, were baseless, not substantiated, did not reflect the true state of affairs and were made with the ulterior motive of depriving the petitioner of his business.

Subsequent thereto another inspection was held on 28.09.1991, wherein also the second respondent found the stock particulars to be within limits and the density to be O.K. Petitioner would submit that, though the Corporation had not changed the hosepipe which, in the inspection held on 24.8.1991, was found to be defective, the second respondent in his report dated 28.09.1991 had observed that the equipment was functioning normally, and that the very same officer had submitted two contradictory reports within a span of a month. The second respondent, in his report dated 28.09.1991, observed that the Retail Outlet was neglected, the Dealer was absconding and was disinterested in business, that the pump pedestal had to be reconstructed and that the pump tube lights had to be repaired. According to the petitioner these works were required to be carried out by the Corporation and it was only to cover up their lapses that the respondents had made unfounded and motivated allegations against him.

A third inspection was held and, in his report dated 28.12.1991, the 2nd respondent observed that there was an

excess of 348 liters on a sale of 1,55,349 liters, which was beyond permissible limits. Petitioner would submit that in the earlier report dated 28.09.1991, while the variation of minus (-) 176 liters on sales of 48,061 litres was found to be within permissible limits, curiously in the inspection report of 28.12.1991, excess stock of plus (+) 348 liters on sales of 1,55,349 liters was held to be beyond permissible limits. According to the petitioner, these findings were contrary to the norms prescribed in G.S.R.811 (e) dated 27.12.1990 issued under the Essential Commodities Act, 1955 and the allegations, in the reports, were made with an ulterior motive and with a vindictive attitude. Petitioner would allege that on 28.12.1991, while the petrol tank was empty and a sample was taken by squeezing petrol from the tank, the density was however not recorded and that such extraction of the sample was in contravention of the norms prescribed in G.S.R.811(e) dated 27.12.1990. Petitioner would contend that the observations in the report dated 28.12.1991, that the retail outlet was neglected, that the dealer could not to be traced, and that the dealer should report to the divisional office immediately, were not warranted, without any basis and were made only with a view to victimize him. Petitioner would submit that, as against the quantity indented and prepaid from 17.12.1991 to 28.12.1991, the quantity actually delivered was far less and, having failed to supply the quantity indented for, the observations of the second respondent, in these three reports, that the Retail Outlet was neglected was highly arbitrary and unreasonable.

Consequent to the inspection report dated 28.12.1991, the second respondent ordered stoppage of sales in the Retail Outlet. Petitioner claims to have visited the office of the second

respondent and to have demanded that they give reasons for making these observations in the inspection reports. Petitioner contends that the second respondent had not chosen either to give reasons or to substantiate the observations made in the inspection reports. The Corporation, vide letter dated 02.01.1992 received by the petitioner on 13.01.1992, informed him that the stock variation was found to be beyond the permissible limits, that the Retail Outlet was not maintained properly and that sales should not be resumed until further advise. Petitioner would contend that stoppage of sales had caused him irreparable loss, apart from loss of reputation, which necessitated his having to issue legal notice dated 13.01.1992. The respondents issued notice dated 14.01.1992, received by the petitioner on 21.01.1992, without reference to the legal notice sent by the petitioner on 13.1.1992. Petitioner filed O.S.No.60 of 1992, before the Subordinate Judge, Ranga Reddy District on 13.02.1992, against the respondents, seeking damages of Rs.6,00,000/- (Rupees six lakhs). Respondents filed an application, in I.A.No.340 of 1992, under Section 34 of the Arbitration Act, 1940 seeking stay of all further proceedings in the suit placing reliance on the arbitration clause in the agreement dated 13.07.1984, which the petitioner claims not to have signed. Thereafter, the impugned order dated 21.09.1994 was passed terminating the agreement.

The petitioner, while denying execution of any such agreement, would contend that the Corporation has no power to cancel the dealership, that the action of the respondents, in passing the impugned order dated 21.09.1994 terminating the agreement, was violative of Articles 14 and 19 (1) (g) of the

Constitution of India, that the dealership licence is property and that he could not be deprived thereof without following the procedure prescribed by law and the very fact that the impugned order was passed, after a lapse of more than 2 ½ years after the suit was filed, would show that it was not a bonafide act and was vitiated by extraneous considerations.

Respondents, on the other hand, would contend that the Writ Petition as filed is not maintainable as the dealership was terminated in accordance with clause 58 of the agreement and that the remedy, if any, available to the petitioner to enforce his rights was by approaching the appropriate forum and not by way of a Writ Petition under Article 226 of the Constitution of India. It is stated that, after litigation commenced in 1992, the petitioner had stopped approaching the respondent Corporation for supply of HSD, that the last supply was made before March, 1992 and thereafter, the Retail Outlet was not in operation. It is also stated that the landlord had filed a suit against the petitioner and had evicted him from the Retail Outlet, that there had been no proposal, thereafter, for resitement of the Retail Outlet and that the Writ Petition has, therefore, become infructuous. Respondents would submit that the retail outlet premises was being inspected by the first respondent Corporation, from time to time, eversince the inception of the dealership in 1979, that the petitioner did not evince any interest in operating the retail outlet and that he was warned on several occasions that such negligence, and mismanagement of the retail outlet, would result in cancellation of the dealership. While stating that several letters were addressed to the petitioner, respondents would rely on a few such letters in the counter affidavit and contend that these letters would show

that the petitioner had mismanaged the retail outlet and had caused loss to the corporation due to low sales. It is stated that the respondent corporation makes an assessment of the sales potential of each retail outlet, taking into consideration the sales of other retail outlets in the vicinity, including sales outlets of other petroleum corporations, the traffic in the area and the future potential of the area. On that basis, the sales potential of the petitioner's retail outlet was assessed to be in the region of 650 KL per month whereas the overall sales of the outlet was less than 60 KL per month. Respondents would deny the allegations that the petitioner was managing the retail outlet properly and that they had made false and baseless allegations against him. Respondents would submit that the petitioner had, in fact, informed them that he was not in a position to bring in the necessary finance for proper management and operation of the retail outlet and had requested them to permit him to bring Sri R. Krishnaswamy as a partner in the dealership, so that adequate finance could be pumped in to increase sales in the retail outlet and, while the proposals had been recommended by the Committee appointed by the corporation, the petitioner did not induct Mr. Krishnaswamy into the firm and continued to neglect the retail outlet. Respondents would submit that the petitioner was asked to explain as to how the hose had got damaged but he did not choose to give any explanation nor did he bother to approach the officials for rectification of the hose. According to the respondents, the responsibility for proper illumination was on the petitioner, the safety standards maintained by the petitioner were also low, the staff of the petitioner at the retail outlet were using a kerosene stove for cooking within the licensed premises of the retail outlet

and, instead of ensuring that there was no possibility of accidental fire, the petitioner's staff had themselves indulged in such activities which could have resulted in the retail outlet being burnt down. Respondents would submit that, while the dealership agreement stipulated that the petitioner should sell only the petroleum products of the respondent Corporation and that other products should not be sold in the retail outlet, the various inspections revealed that the petitioner was purchasing lubricants from other sources and selling them in the retail outlet and that such sales of sub-standard products had resulted in loss of their reputation as the general public would assume that the lubricants being sold by the petitioner were the genuine lubricants of the respondent corporation. It is stated that the petitioner was not available at the retail outlet or at any other place for communication with the officials of the corporation. Respondents would deny any ulterior motive for making the observations in the inspection reports and would submit that the earlier letters addressed by the corporation to the petitioner would show that, right from the date on which the retail outlet was established, the petitioner had never evinced interest in running the retail outlet and that mismanagement of the retail outlet continued despite various reminders. It is stated that the petitioner never visited the office of the respondents to explain the reasons for the low sales and poor maintenance in person, that during inspection the petitioner was never present and could not even be contacted and it was for these reasons that the inspection reports contained a note that the petitioner was disinterested in his business and that the retail outlet was mismanaged. Respondents would submit that its officers did not bear personal grudge against the petitioner and

that the reports submitted by them were based on the actual findings during the course of inspection that the petitioner was not found in the retail outlet, he did not evince any interest in running the retail outlet and, as there was no interaction with the officials of the respondent corporation, specific observations were made in the report that the retail outlet was neglected and that the dealer was not interested in the business. With reference to the report dated 28.12.1991, it is stated that the quantity of excess stock found was beyond permissible limits and automatically attracted penalties and other charges as prescribed under the contract. Respondents would deny the contention that the stock found was within permissible limits prescribed under GSR-811 (e) dated 27.12.1990. They would submit that the samples drawn by them were in conformity with the prescribed norms, that while the Corporation always ensured that the entire quantity indented was supplied, if there was a shortfall in supplies, on rare occasions, it was immediately made up in the next supply. According to the respondents, due to paucity of time, the allegations made by the petitioner could not be verified with reference to the records relating thereto. It is stated that, whenever stock variations are found, sales are directed to be stopped. Respondents would submit that, over a period of time, the petitioner was not taking any interest in the operation of the retail outlet and left its operations to his staff and as his negligence had resulted in fall in sales at the retail outlet, his explanation was called for. Respondents would deny the allegation that the petitioner did not sign the agreement and would submit that the petitioner had signed the agreement on behalf of M/s. Sree Rama Service Station. It is stated that no stocks were taken by the petitioner, from the respondents,

pursuant to the interlocutory application filed by the respondents in the suit to have the matter referred to arbitration, that the order of termination was not passed immediately and that the delay was on account of the petitioner having initiating litigation. Respondents deny the allegation that the order was passed belatedly and state that the petitioner was fully aware of the charges made against him and did not bother to take any steps to appear before the officials of the respondent Corporation.

Sri V. Ravinder Rao, learned counsel for the petitioner, would submit that the deficiencies pointed out in all the three inspection reports of the 2nd respondent dated 24.8.1991, 28.8.1991 and 24.12.1991, with regards slow delivery of the hose pipe, absence of light, reconstruction of the pump pedestal etc, were matters which the respondent –corporation was required to rectify. Learned Counsel would refer to clauses 13, 14, 16 and 17 read with annexure II of the agreement and submit that in the impugned order dated 21.9.1994, terminating the agreement in exercise of the powers under Clause 58(m), the only discrepancies referred to were in relation to the inspection conducted at the retail outlet on 28.12.1991 and, as these discrepancies required rectification not by the petitioner, but by the respondent– corporation itself, the impugned order was liable to be set aside as arbitrary and illegal. Learned counsel would submit that the impugned order, terminating the agreement, was passed only on the basis of the inspection report dated 28.12.1991 and, as nothing adverse was pointed out even in the immediately preceding two inspection reports dated 24.8.1991 and 28.12.1991, it was not open to the respondents to rely on past events or to

refer to earlier correspondents in justification of their action in terminating the agreement. Learned counsel would submit that it is not open to the respondents to supplement the grounds for terminating the agreement placing reliance on certain other correspondence, which though not reflected in the impugned order has been referred to in the counter affidavit. Learned counsel would submit that, while the agreement contains an arbitration clause, in the present case the impugned order violates the fundamental rights of the petitioner under Articles 14 and 19(1)(g) of the Constitution of India. According to the learned Counsel, as it was passed without putting the petitioner on notice and without application of mind, the impugned order was in violation of the principles of natural justice. Learned counsel would submit that, in cases where fundamental rights are violated or the impugned order is in violation of principles of natural justice, mere existence of an alternative remedy is no bar for exercise of jurisdiction under Article 226 of the Constitution of India, more so, when facts are not in dispute. Learned counsel would place reliance on **Sanjana M. Wig v. Hindustan Petroleum Corporation**[1], **Indian Oil Corporation Ltd v. Amritsar Gas Service**[2], **Harbanslal Sahnia v. Indian Oil Corporation Ltd**[3], and **E. Venkatakrishna v. Indian Oil Corporation**[4]. Learned counsel would submit that in the present case, since the facts are not in dispute, no oral evidence is required to be adduced, the impugned order and the decision of the respondent – corporation in terminating the agreement is in the realm of public law and as the decision is arbitrary and in violation of the petitioner's fundamental rights

under Articles 14 and 19(1)(g) of the Constitution of India, this Court would not refuse to exercise its discretion, under Article 226 of the Constitution of India, to entertain and adjudicate the cause in the writ petition. Learned counsel would submit that, since the reply submitted by the petitioner to the earlier inspection reports was ignored and as the domestic forum of arbitration, under the agreement, did not confer on the arbitrator the power to grant the relief sought for in this writ petition, the petitioner should not be non-suited on the ground of existence of an alternative remedy either by way of arbitration or by way of a civil suit before the civil court of competent jurisdiction.

Sri R. Raghunandan, learned counsel for the respondent–corporation, on the other hand, would refer to the earlier correspondence right from 1987 wherein the petitioner had been repeatedly advised to rectify the deficiencies and to improve the functioning of the retail outlet. Learned counsel would refer to a few of such letters dated 6.4.1987, 21.3.1989, 16.11.1989, 9.2.1990 and 23.3.1990 to submit that, despite repeated requests calling upon the petitioner to come over in person for discussion with the officials of the respondent–corporation with a view to improve the functioning of the retail outlet, the petitioner had failed to do so. Learned counsel would submit that, as the petitioner had neglected the retail outlet, and its poor performance had adversely affected the reputation of the corporation, the respondents had no alternative but to invoke the power, conferred under Clause 58(m), to terminate the agreement. Learned counsel would submit that, while the respondent–corporation may be an instrumentality of the State, under Article 12 of the Constitution of India, the dealership agreement with the petitioner was, however, non-statutory.

Learned Counsel would submit that since contractual disputes are in the private law realm, the public law remedy under Article 226 of the Constitution of India would not, normally, be permitted to be invoked. Learned Counsel would submit that, since the impugned order terminating the dealership agreement is not traceable to any statutory provision nor was it a quasi-judicial order, the requirement that reasons should be forthcoming in the order itself and cannot be supplemented by way of additional evidence, has no application. Learned Counsel would submit, that in all the inspection reports, it has been observed that the retail outlet has been neglected and that the petitioner should come over for discussion to the divisional office of the respondent corporation. According to the learned Counsel what was referred to in the Inspection reports is but a reiteration of the earlier instances of neglect of the retail outlet, which was highlighted in the earlier correspondence between the petitioner and the respondent – corporation. Learned counsel would submit that the petitioner had chosen not to rectify the earlier deficiencies and had referred only to the inspection reports with a view to shift the blame on the respondent– corporation, though he had, right from the inception, had neglected the retail outlet and had failed to maintain the prescribed standards. Learned Counsel would submit that the earlier correspondence referred to would establish that the petitioner was responsible for the poor performance of the retail outlet and that, in any event, these were all matters which were to be adjudicated after evidence was adduced either before the arbitrator or the civil court of competent jurisdiction and not in summary proceedings under Article 226 of the Constitution of India. Learned Counsel would submit that, during the pendency of

proceedings before this Court, the landlord had evicted the petitioner from the premises in which the retail outlet was hitherto being run and, since the premises wherein the retail outlet was located was no longer available, the cause in the writ petition has become academic and no relief could be granted to the petitioner.

The distinction between public law and private law assumes significance as this Court would not, ordinarily, exercise its extra-ordinary jurisdiction, under Article 226 of the Constitution of India, to adjudicate disputes in the private law realm. Public law is a system which enforces the proper performance by public bodies of the duties which they owe to the public. Every body which is created by a statute, and whose powers and duties are defined by the statute, is a 'public authority'. Private law is a system which protects the private rights of private individuals or the private rights of public bodies. Distinction therein is that the public as a whole is the beneficiary of what is protected by public law and it is the individuals or bodies entitled to the right which are beneficiaries of the protection provided by private law. The respondent corporation, in carrying on its business of sale of petroleum and its products, does not discharge any public law functions or duties. Not all decisions taken by bodies in the course of their public functions are subject-matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function:

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a

case, that branch of the law and its remedies should and normally will be applied; and

(b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute."

(Desmith, Woolf and Jowell's Judicial Review of Administrative Action, 5th Edition; Hindustan Petroleum Corporation v. Ali Jafar[5])

Public duty can never be equated to that of an obligation to any person or identifiable group of persons. Public duty is owed to the public in general and not specifically to any person or group of

individuals. That is the precise character of public law duty in contra distinction to private law, which is normally founded upon a contract or tort etc., as the case may be. (**Ali Jafar**[5]).

For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law – be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbibed with a public law element. The question is required to be determined in each case having the aforementioned principles in mind. It may not, however, be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give an exhaustive list of such actions. (**Union of India Vs. S.B. Vohan**[6]) . Access to justice by way of a public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief. If a serious disputed question of fact is involved, arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition would be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondents. (**Sanjana M.Wig**[1]). In this context it is useful to refer to **Sri Konaseema Cooperative Central Bank Ltd v. N.Seetharama Raju**[7] wherein the Full Bench of this Court observed:-

".....**Distinction between 'public law' and 'private law'**:

Difficult as this distinction is and incapable of precise demarcation, it is yet necessary to keep the broad distinction in mind. Lord Denning in his book "The Closing Chapter" has this to say on the subject:

"The first thing to notice is that public law is confined to 'public authorities'. What are 'public authorities'? There is only one avenue of Approach. It is by asking, in the words of Section 31(2)(b) of the Supreme Court Act 1981: What is the 'nature of the persons and bodies against whom relief may be granted by such orders', that is, by mandamus, prohibition or certiorari'?

These are divided into two main categories:

First, the persons or bodies who have legal authority to determine questions affecting the common law or statutory rights or obligations of other persons as individuals. That is the formula stated by Lord Justice Atkin in R. London Electricity Joint Committee Co. (1920) Ltd, (1924) 1 KB 171/2005 as broadened by Lord Diplock in O'Reilly Vs. Mackman (1982)3,, wlr 1096/1104).

Second, the persons or bodies who are entrusted by Parliament with functions, powers and duties which involve the making of decision of a public nature.....To which I would add the words of Lord Goddard, C.J. in R. v. National Joint Council for Dental Technicians, ex parte Neate (1953) 1 QB 704/707):

"The bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction".

But those categories are not exhaustive. The courts can extend them to any other person or body of a public nature exercising public duties which it is desirable to control by the remedy of judicial review.

There are many cases which give guidance, but I will just give some illustrations.

Every body which is created by statute and whose powers and duties are defined by statute is a 'public authority'. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. So are members of a statutory tribunal or inquiry, and the board of visitors of a prison. The Criminal Injuries Compensation Board is a public authority. So also, I suggest, is a university incorporated by Royal charter, and the managers of a State School. So is the Boundary Commission: and the Committee of Lloyd's.

But a limited liability company incorporated under the Companies Acts is not a 'public authority', (see Tozer Vs. National Greyhound Racing Club Ltd (1983) Times, 16 May). Nor is an unincorporated association like the Jockey Club.....".

Sir Harry Woolf, a Lord Justice of Court of Appeal, points out the distinction in the following words:-

"I regard public law as being the system which enforces the proper performance by public bodies of the duties which they owe to the public. I regard private law as being the system which protects the private rights of private individuals or the private rights of public bodies. The critical distinction arises out of the fact that it is the public as a whole, or in the case of local government the public in the locality, who are the beneficiaries of what is protected by public law and it is the individuals or bodies entitled to the rights who are the beneficiaries of the protection provided by private law..."

(see page 221 of this Article "Public Law Private Law: Why the Divide?

A personal View (published in “Public Law” Summer: (1986)”)

The learned Law Lord stated further in the same Article, at page 223:

“While public law deals only with public bodies, this does not mean that the activities of public bodies are never governed by private law. Like public figures, at lest in theory, public bodies are entitled to have a private life There have been suggestions that in the commercial field public bodies should adopt different and higher ethical standards than private individuals, but this is not yet required as a matter of law and in relation to purely commercial transactions the same law is applicable, whether or not a public duty is involved. Prima facie, the same is true in relation to employment. The servant employed by a public body ordinarily has the same private rights as any other servant…..”

The position may, however, be different pointed out the learned Law Lord if such relationship is circumscribed by a statutory provision.

Applying the above test, the appellant – Society herein cannot be called a public body. It has no duty towards public. Its duty is towards its members only. It has no power to take any action, or pass any order affecting the rights of the members of public. The binding nature of its orders and action is confined to its members, and to its employees. It is neither a statutory body nor are its relations with its employees governed by a statute. Its functions are also not akin to governmental functions. Nor is it a case where it can be said that the reality behind the Society is the executive power of the State. Moreover, even if for some distant reason it can be characterized as a public body, even so the contract of service between it and the writ petitioner cannot be treated as belonging to ‘public law’ field. It is a pure and simple contract of service, and there is no statutory provision regulating, circumscribing, and governing the said relationship excepting Section 47 of the A.P. Shops and Establishments Act, 1988, which imposes certain restrictions in the matter of termination of service of the employees of a co-operative society. This aspect we shall consider presently…….”

Since the disputes, which arise for adjudication in this writ petition are contractual, non-statutory and in the realm of private law, the public law remedy, under Article 226 of the Constitution of India cannot, ordinarily, be permitted to be invoked.

Ordinarily, when a dispute between the parties requires adjudication of disputed question of facts wherefor the parties are required to lead evidence, both oral and documentary which can be determined by a domestic forum chosen by the parties, this

Court may not entertain a writ application. Mere existence of an alternative remedy would not, however, bar the High Court, under Article 226 of the Constitution of India, from exercising its jurisdiction. The High Court may exercise its writ jurisdiction in at least three contingencies: (*i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. The question as to when such a discretionary jurisdiction is to be exercised or refused to be exercised by the High Court has to be determined having regard to the facts and circumstances of each case wherefor, no hard-and-fast rule can be laid down. (**Sanjana M. Wig**[1]).

Since reliance is placed on **Amritsar Gas Service**[2]**, Harbanslal Sahnia**[3] and **E.Venkatakrishna**[4] it is necessary to refer to what has been held in these judgments:

In **Amritsar Gas Service**[2], an application filed by Indian Oil Corporation, under Section 34 of the Arbitration Act for stay of the suit was dismissed by the First Class Sub Judge, Amritsar. The appeal preferred thereagainst was dismissed and the revision was also dismissed by the High Court. On appeal the Supreme Court held:-

"……**The arguments advanced by Shri Harish Salve on behalf of the appellant-Corporation to the validity of the award are these. The first contention is that the validity of the award has to be tested on the principles of private law and the law of contracts and not on the touchstone of constitutional limitations to which the Indian Oil Corporation Ltd., as an instrumentality of the State may be subject since the suit was based on breach of contract alone and the arbitrator also proceeded only on that basis to grant the reliefs. It is urged that**

for this reason the further questions of public law do not arise on the facts of the present case. The next contention is that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition in Sections 14 and 16 of the Specific Relief Act. It is urged that the contract being admittedly revokable at the instance of either party in accordance with clause 28 of the agreement, the only relief which can be granted on the finding of breach of contract by the appellant-Corporation is damages for the notice period of 30 days and no more. It was then urged that the reasons given in the award for granting the relief of restoration of the distributorship are untenable, being contrary to law. Shri Salve contended that the propositions of law indicated in the award and applied for granting the reliefs disclose an error of law apparent on the face of the award. It was also urged that the onus of proving valid termination of the contract was wrongly placed by the arbitrator on the appellant-Corporation instead of requiring the plaintiff-respondent 1 to prove that the termination was invalid. It was also contended that the failure of the arbitrator to consider and decide the appellant-Corporations counter-claim when the whole suit was referred for decision constitute legal misconduct.

In reply, Shri Sehgal on behalf of respondent 1 contended that there is a presumption of validity of award and the objections not taken specifically must be ignored. This argument of Shri Sehgal relates to the grievance of the appellant relating to placing the onus on the appellant-Corporation of proving validity of the termination. This contention of Shri Sehgal must be upheld since no such specific ground is taken in the objections of the appellant. Moreover, there being a clear finding by the arbitrator of breach of contract by invalid termination, the question of onus is really of no significance. The other arguments of Shri Sehgal are that the termination of distributorship casts stigma on the partners of the firm; counter-claim of the appellant-Corporation was rightly not considered since it was not made before the order of the reference; the reference made being of all disputes in the suit, the nature of relief to be granted was also within the arbitrators jurisdiction; and interest also must be awarded to the respondent.

We may at the outset mention that it is not necessary in the present case to go into the constitutional limitations of Article 14 of the Constitution to which the appellant-Corporation as an instrumentality of the State would be subject particularly in view of the recent decisions of this Court in *Dwarkadas Marfatia and Sons* v. *Board of Trustees of the Port of Bombay* 1, *Mahabir Auto Stores* v. *Indian Oil Corporation* 2 and *Shrilekha Vidyarthi* v. *State of U.P.* 3 This is on account of the fact that the suit was based only on breach of contract and remedies flowing therefrom and it is on this basis alone that the arbitrator has given his award. Shri Salve is, therefore, right in contending that the further questions of public law based on Article 14

of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act providing for non-enforceability of certain types of contracts. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us……..”(emphasis supplied)

In **Harbanslal Sahnia**[2], the dealership agreement between the appellant and the Indian Oil Corporation was terminated. Challenge to the order of termination was dismissed by the High Court on the ground that the relationship between the parties was contractual and, since the dealership agreement contained an arbitration clause, the appropriate remedy available to the appellant was to have recourse to arbitration rather than invoking the jurisdiction of the High Court. A review of the order, as sought by the appellant, was refused by the High Court. On appeal by way of special leave, the Supreme Court observed:

“…….**So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (*i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See *Whirlpool Corpn.* v. *Registrar of Trade Marks* 1.) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings**……..”(emphasis supplied)

In **E. Venkatakrishna**[4] the appellant was appointed as a dealer of Indian Oil Corporation. The contract contained a clause whereby the distributorship could be terminated if the dealer committed anything which was prejudicial to the interest or good name of the principal or its products. It was the case of the Indian Oil Corporation that the appellant had stored spurious gas cylinders and therefore the dealership was terminated in terms of the said clause. The appellant filed a writ petition before the Karnataka High Court seeking restoration of distributorship. The Karnataka High Court dismissed the writ petition holding that there was an arbitration clause in the contract, that it was open to the appellant to raise the points in dispute and plead before the arbitrator that the termination of distributorship was arbitrary and that the material, on the basis of which the opinion was formed, did not exist or did not justify formation of such an opinion and that, if such a plea was raised, the arbitrator was duty bound to consider as to whether the opinion formed was based on sufficient material and if not to give appropriate relief to the petitioner. The appellant invoked the arbitration clause, an arbitrator was appointed and the appellant filed a claim statement before the arbitrator praying to set aside the order terminating the contract, for damages, for a direction to the respondent to restore the distributorship to the claimants and for incidental reliefs. The arbitrator passed an award directing that the distributorship be restored to the appellant forthwith. The award was challenged by the Indian Oil Corporation under Section 30 of the Arbitration Act, 1940 before the Madras High Court. On the challenge being rejected, the matter was carried in appeal and the Division Bench of the Madras High Court held that what was arbitrable under Clause 37 of the agreement

was only the dispute or difference in relation to the agreement, that the question of restoration of distributorship did not arise under the agreement, that the arbitrator was not empowered and had no jurisdiction to direct restoration of distributorship. Aggrieved thereby, the matter was carried in appeal and the Supreme Court held:-

"……It was contended that the appellant had invoked the arbitration clause only because of the order of the learned Single Judge of the Karnataka High Court on the writ petition that he had filed and that that order contemplated that the arbitrator, acting on the arbitration clause in the agreement, would have the authority to award restoration. In the first place, we do not find any such observation in the judgment of the learned Single Judge. In any event, such observation, even if it were there, would not vest the arbitrator with a jurisdiction that he did not otherwise possess in law……"

The question as to whether the High Court, under Article 226 of the Constitution of India, would exercise its discretion to adjudicate disputes, arising out of non-statutory contracts of matters in the private law realm, did not arise for consideration either in **E.Venkatakrishna**[4], or in **Amritsar Gas Service**[2]. **Harbanslal Sahnia**[3] was considered in **Sanjana M.Wig**[1] wherein the Supreme Court observed:-

"…….In *Harbanslal Sahnia*3, Lahoti, J., (as His Lordship then was), relied upon *Whirlpool Corpn.* v. *Registrar of Trade Marks*13 observing that in an appropriate case, in spite of availability of the alternative remedy, **the High Court may still exercise its writ jurisdiction in at least three contingencies: (*i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged**.

We may, however, notice that the Bench did not notice the earlier decisions in *Titagarh Paper Mills Ltd.*10 and *Bisra Stone Lime Co. Ltd.*11 **However, there cannot be any doubt whatsoever that the question as to when such a discretionary jurisdiction is to be exercised or refused to be exercised by the High Court has to be determined having regard to the facts and circumstances of each case wherefor, no hard-and-fast rule can be laid down**.

A three-Judge Bench of this Court in *Gujarat Ambuja Cement Ltd.*4 referring to *Harbanslal Sahnia*3 held: (SCC pp. 517-18, paras 22-23)

22[*24*]. …There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

23[*25*]. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute.

……It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held by this Court in *Amritsar Gas Service*2 and *E. Venkatakrishna*1 that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent. (emphasis supplied)

I n **ABL International Ltd. v Export Credit Guarantee Corpn. Of India Limited**[8] the Supreme Court observed:

"……..**When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition**. Rejection of a petition *in limine* will normally be justified." (emphasis supplied)

The Division Bench of this Court in **Sri Lalitha Devi Gas Agencies v. Hindustan Petroleum Corporation Ltd**[9] held:

"….**Now that a specific clause has been included in the agreement that has been entered into between the parties, in our opinion, the entire matter has to be referred to the sole arbitrator of the Managing Director of the Corporation or some officer of the Corporation, who may be nominated by him. The petitioner is at liberty to raise all the contentions, which have already been raised in this writ petition and also in the writ appeal and file any other additional document, if the petitioner so chooses.** Likewise, the respondent – Corporation is also at liberty to raise their claim if any, before the arbitrator. Now, that both the parties have agreed to refer the dispute for arbitration, we need not once again direct the petitioner to invoke clause 38 and correspond with the respondent, which in our opinion, is wholly unnecessary. The arbitrator shall immediately after entering upon the appearance, may issue notice to both parties and then proceed further to consider all the claims made by the petitioner and the respondent – Corporation. The Managing Director, who is nominated as arbitrator shall conduct and complete arbitration proceedings within two months.

The arbitration proceedings shall commence within one month from the date of the receipt of our order. Till the arbitration proceedings are completed the status quo obtaining as on today shall be maintained between the parties. There will be stay of collection of the impugned demand till the arbitrator completes the arbitration proceedings. …(emphasis supplied)

In **Sanjana M. Wig**[1] the Supreme Court observed:

"**…….It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held by this Court in *Amritsar Gas Service*2 and *E. Venkatakrishna*1 that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained**

when it involves a public law character or involves a question arising out of public law functions on the part of the respondent……." (emphasis supplied)

The plenary jurisdiction of the High Court, under Article 226 of the Constitution of India, would ordinarily not to be exercised to the exclusion of effective alternative remedies. That does not mean that the High Court is prohibited from doing so. The question is not of lack of jurisdiction but of exercise of discretion. While even disputed questions of fact can be adjudicated by the High Court, under Article 226 of the Constitution of India, such disputed questions of fact, more so, when they arise out of non-statutory contractual disputes which are in private law realm, are better suited for adjudication either before the arbitral tribunal constituted in terms of the agreement or before a civil court of competent jurisdiction.

In the inspection report dated 24.8.1991, the 2nd respondent had observed that the retail outlet was mismanaged, that the dealer was absent and was disinterested in business and had specifically recorded that the dealer should call on the divisional office for discussion. Even in the Inspection report dated 28.12.1991 the 2nd respondent recorded that the retail outlet was neglected, that the dealer was not to be traced, that in spite of repeated advices the dealer had not reported to the divisional office which was to be seriously viewed by the divisional office and that he should report to the divisional office immediately.

In their letter dated 6.4.1987, the respondents had informed the petitioner that the DSR was not maintained, that free radiator water service was not available, that the water dips were not being recorded in the DSR, that the first aid box was not available and

that these discrepancies would attract the penalty clause under the existing “Marketing Discipline Guidelines” and eventual suspension of supplies to the outlet. The respondents requested the petitioner to immediately rectify the discrepancies. In their letter dated 21.3.1989 among the several irregularities pointed out was that there were no stocks of lubricants in the retail outlet, that the petitioner was buying engine oil from outside sources and selling them through the outlet, though he aware that he was not permitted to buy petroleum products from sources other than from the respondents. Reference is also made therein to the fact that fire extinguishers/fire buckets were not available. In the letter dated 16.11.1989, the petitioner was informed that from 1.4.1989 till 15.9.1989, he had not lifted even a single litre of lubricant oil, that there was regular sale of lubricants from the retail outlet which showed that he was buying lubricants from outside in violation of the dealership agreement, that there were no fire buckets and fire extinguishers available in the premises which was in violation of the Explosive Rules and that, on several dates, the outlet was kept dry of the product. The petitioner was asked to call on the respondents in person with his explanation before 4.12.1989. Again, vide letter dated 9.2.1990, the petitioner was informed that none of the deficiencies pointed out earlier were complied with and none of the short-comings/lapses had been attended to. The petitioner was asked to show cause as to why the dealership agreement should not be terminated for violation of clauses 21,24,29, 38 and 44 of the said agreement. The petitioner was further informed that it was observed that a stove was kept inside the sales room and cooking was being done there while there were

no fire buckets and fire extinguishers and this was in serious violation of the Explosives Regulations. The petitioner was informed that, in case his reply was not forthcoming, the respondent would be constrained to take action against him. The petitioner was advised, vide letter dated 23.3.1990, to come over in person for discussion with the respondents. Respondents would contend that, despite repeated reminders to do so, the petitioner had failed to come to the divisional office for discussion and, as these irregularities extending over a long period of time had not only affected the performance of the retail outlet but also the reputation of the respondent – corporation, they had no alternative but to terminate the agreement.

The fact that clause 58(m) of the dealership agreement confers power on the respondents to terminate the agreement is not in dispute. The question is as to the justification or otherwise of invocation of such a power. As has been noted above, the dealership agreement between the petitioner and the respondents is not a statutory contract. The power exercised under Clause 58(m) to terminate the dealership agreement is not traceable to any statutory provision nor is it in the nature of a quasi judicial power. As such the law laid down in **Commissioner of Police v. Gordhandas Bhanji**[10] and **Mohinder Singh Gill v. The Chief Election Commissioner**[11], that where the statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of an affidavit or otherwise, has no application.

The earlier correspondence which Sri R. Raghunandan,

Learned Counsel for the respondent – Corporation, has referred to and placed reliance on, if accepted as true, would show that the petitioner had indulged in sale of lubricants purchased from outside and not from the Corporation. The allegation that cooking was carried on and a stove had been lit in the retail outlet, despite the absence of fire buckets and fire extinguishers, if accepted as true, would mean that the very existence of the retail outlet was itself a major fire hazard. These allegations, referred to in the letters addressed by the respondents to the petitioner, have been referred to not for the purpose of adjudication but only to note that these allegations and counter allegations involve determination /adjudication of disputed questions of fact for which evidence, both oral and documentary, may be required to be taken. This is not a case in which this court should exercise its discretion, under Article 226 of the Constitution of India, to interfere. It is left open to the petitioner, if he so chooses, to avail the remedy of approaching the arbitral tribunal as provided for in the dealership agreement, or the civil court of competent jurisdiction, for adjudication of these disputed questions of fact and, in case the petitioner chooses to avail any of these remedies, the arbitral Tribunal/Court shall adjudicate the dispute in accordance with law uninfluenced by any observations made in this order.

The writ petition is dismissed both on the ground that the dispute raised in this writ petition lies in the private law realm and that the disputed questions of fact which arise for consideration are ill-suited for adjudication in summary proceedings under Article 226 of the Constitution of India.

However, in the circumstances, without costs.

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-01-2007

Note: L.R. copy to be marked

B/o

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[1] (2005)8 SCC 242

[2] (1991)1 SCC 533)

[3] (2003)2 SCC 107

[4] (2000)7 SCC 764

[5] 2004(3) ALD 463

[6] 2004(2) SCC 150

[7] AIR 1990 AP 171

[8] (2004) 14 ILD 395 (SC)

[9] (2002) 5 ALD 389

[10] AIR 1952 SC 16

[11] AIR 1978 SC 851